



## **Miguel Estrada and the Future of American Latinos**

The Mexican American Legal Defense and Education Fund's (MALDEF) newfound "concerns" about the nomination of Miguel Estrada to the U.S. Court of Appeals for the D.C. Circuit are without merit. We are disappointed in MALDEF and other like-minded groups that purport to speak for American Latinos, for Miguel Estrada is a nominee of unmatched qualifications. When confirmed, he will become the first Hispanic ever to sit on the D.C. Circuit, which is widely regarded as the second-highest court in the land. This will be an historic achievement, one that was unthinkable only a generation ago, and one that represents a significant milestone in our long struggle to overcome racism, poverty, and cultural exclusion. We in the Latino community should be cheering Miguel Estrada, not just for his own sake, but because his accomplishments show what every one of us is capable of achieving.

And yet some special-interest groups have chosen to place their narrow political agenda ahead of the broad interest in seeing a superbly qualified Latino confirmed to one of the nation's highest courts. These groups appear to advocate the defeat of one of their own simply because he may not subscribe to the political orthodoxy that they have presumed to establish. Some of our Latino leaders have decided to put partisan politics over our community's interests simply to satisfy the needs of their party bosses. Sacrificing Estrada's nomination to the demands of a partisan lynch mob is an act of betrayal to the millions of Latinos who live in this country, and the millions more who one day hope to.

MALDEF's reaction to the Miguel Estrada nomination makes clear that more is at stake than whether this well-qualified attorney takes the federal bench. More is at stake than whether one more barrier to Hispanic achievement—our historical exclusion from the D.C. Circuit bench—falls today, tomorrow, or some time in the near future. What's at stake is whether a Hispanic immigrant who is not a committed liberal Democrat can receive the support of MALDEF and like-minded organizations. If MALDEF has its way, no Hispanic will ever be promoted to high government office unless he or she holds the interest-group-approved set of political beliefs.

The Hispanic community in America is far more diverse than MALDEF and others give us credit for being: we are a rich tapestry representing the full range of political and judicial perspectives, religious views, and socio-economic circumstances. As a federal judge on the D.C. Circuit, we are confident that Miguel Estrada will be a credit to Latinos everywhere, no matter what their background or beliefs.

## Defending Anti-Gang Initiatives

Perhaps the most disingenuous—and repetitive—claim MALDEF makes is that Estrada’s effort to defend the constitutionality of anti-gang laws in Chicago and Annapolis somehow is evidence of his indifference to the difficulties faced by racial minorities, including Latinos. Nothing could be further from the truth. The innovative anti-gang initiatives in Chicago, Annapolis, and countless other American cities represent efforts by minority communities to take back their streets from the gang members and drug dealers who habitually terrorize innocent citizens, many of whom are minorities themselves. Estrada’s efforts to defend these ordinances before the U.S. Supreme Court and before a federal trial court in Maryland demonstrate his commitment to representing clients who seek to better the lives of poor residents of the inner city.

People from across the political spectrum, and members of all races, agree that gang-related violence and drug trafficking have had a devastating impact on the lives of inner-city residents. Gang members routinely loiter on street corners, both to establish control over neighborhood residents and to “mark their turf” against rival gangs. As a result, people who live in gang-infested neighborhoods often are afraid to even leave their homes. Simply walking to the grocery store, or escorting one’s children to the neighborhood park, exposes them to the risks of drive-by shootings and drug solicitations. A Justice Department report issued during the Clinton Administration concluded that **gangs have “[v]irtually overtake[n] certain neighborhoods, contributing to the economic and social decline of these areas and causing fear and lifestyle changes among law-abiding residents.”** *OJP Monograph, Urban Street Gang Enforcement* (1997).

That’s why anti-gang laws like the ones in Chicago and Annapolis have the strong backing of those who live in our nation’s crime-ridden neighborhoods, including minorities. After 74-year-old Chicagoan Emmett Moore saw his house sprayed with bullets during a recent gang turf war, he explained: **“The constitution is supposed to protect my rights too. What’s a more basic right than feeling safe on my property or being able to walk on my street?”** *Patriot-Ledger* (Quincy, Mass.), June 11, 1999. Bennie Meeks, head of the Southwest Austin Council on Chicago’s west side, likewise wondered **“if we don’t use this law as a tool, how are we going to get these guys off the corner? What about the constitutional rights of my neighbors whose kids have to walk by that corner every day on their way to school?”** *New York Times*, June 12, 1999.

Chicago Mayor Richard Daley, a Democrat who the *New York Times* calls the “fiercest advocate” of Chicago’s anti-gang law, *New York Times*, June 12, 1999, explains that his ordinance was designed to protect these vulnerable citizens from predatory gang members who seek to do them harm. In fact, Mayor Daley likens gang members to terrorists: **“I tell you one thing, those drug dealers and gang-bangers are terrorists, too.”** *Chicago Sun-Times*, Nov. 23, 2001. Mayor Daley knows that these laws were written to help the residents of poor, urban neighborhoods, who suffer disproportionately from the scourges of gang violence and drug trafficking. **“I don’t see too many gangbangers on Lake Shore Drive.”** *Chicago Tribune*, Oct. 1, 2000. Those who criticize such efforts to improve the lot of our nation’s most vulnerable

citizens rarely live in the conditions that prompted Chicago, Annapolis, and countless other cities to adopt these innovative measures.

Many other well-regarded, mainstream lawyers submitted briefs defending the constitutionality of anti-gang laws. In fact, President Clinton's **Solicitor General Seth Waxman** filed a Supreme Court brief arguing in favor of Chicago's ordinance. So did **Representative Luis V. Gutierrez (D-IL)**, a member of the Congressional Hispanic Caucus. And so did the Attorneys General from 31 states, including five states represented by Democrats on the Senate Judiciary Committee: **California, Delaware, Illinois, New York, and North Carolina.**

MALDEF also faults Estrada for his service on the Board of Directors of the Center for the Community Interest. CCI is a mainstream organization dedicated to serving as a voice for the community on crime and quality-of-life issues. In particular, CCI has defended "Megan's Laws" and other measures to protect children from sexual predators, has assisted public-housing tenants in evicting drug dealers from their housing projects, and has fought for mandatory HIV testing of rapists.

CCI is supported by individuals and organizations from across the political spectrum. According to the group's web site, one of its principal sources of funding is the New York-based Bernard and Anne Spitzer Foundation. In fact, their son, New York Attorney General **Eliot Spitzer** served on CCI's board before he was elected to public office. No one would mistake Spitzer for a right-wing activist; a Democrat, he is best known for spearheading a lawsuit brought by several states against the tobacco industry. CCI's advisory board also includes **Ronald Truss**, president of the Birmingham, Alabama chapter of the NAACP. Other prominent liberals and Democrats with ties to CCI include Milwaukee Mayor **John Norquist**; **Fred Siegel**, a scholar with the Democratic Leadership Council; **Richard Girgenti**, former New York State Director of Criminal Justice under Governor Mario Cuomo; **Seymour Lachman**, a member of the New York State Senate; and **Stephen Kaufman** and **Nettie Mayersohn**, members of the New York State Assembly.

MALDEF was nowhere to be seen several months ago, when the Senate confirmed **Michael Baylson** to be a U.S. District Judge for the Eastern District of Pennsylvania. Like Estrada, Judge Baylson has served on CCI's board of directors. And yet his affiliation with the group got a free pass. The groups' latter-day concern about CCI raises the question whether they are more concerned with improving the lot of underprivileged Latinos, or in ensuring that American Latinos dutifully subscribe to their established political orthodoxy.

### **A Balanced Approach to Law Enforcement**

Although Estrada spent his early career as an Assistant U.S. Attorney in New York, and as a lawyer in the Solicitor General's office during the Clinton Administration, he also has gone out of his way to ensure that criminal defendants receive proper treatment from the criminal justice system. For instance, in *Strickler v. Greene*, 527 U.S. 263 (1999), Estrada represented a capital-murder convict in his death-row appeal before the Supreme Court. Tommy David

Strickler, whom Estrada represented free of charge, was convicted of abducting a college student from a shopping center and murdering her. Estrada argued that the Commonwealth of Virginia had unlawfully withheld potentially exculpatory evidence. He thus showed his willingness to stand up for the rights of all people, even those convicted of brutal crimes.

Estrada's commitment to the constitutional rights of criminal defendants, as well as his manifest skills as an appellate advocate, explain why Barbara Hartung, his co-counsel in the case, asked him to help represent Tommy Strickler. Hartung has written the Senate Judiciary Committee to emphasize that Estrada **"values highly the just and proper application of the law. . . . Miguel's respect for the Constitution and the law may explain why he took on Mr. Strickler's case, which at the bottom concerned the fundamental fairness of a capital trial and death sentence. . . ."** I should note that Miguel and I have widely divergent political views and disagree strongly on important issues. However, I am confident that Miguel Estrada will be a distinguished, fair and honest member of the federal appellate bench."

MALDEF also wrongly assumes that Estrada was responsible for deciding what positions to take in the cases he argued on behalf of law enforcement when he was at the Solicitor General's office. In fact, Estrada was a career lawyer in a civil service position, and it was his role in the cases cited by MALDEF to advance the positions chosen by his supervisors—in this case, representatives of the Clinton Administration—not to make policy himself. To the extent that it is "troubled" by any of these positions, MALDEF's beef is with policymakers like President Clinton and Attorney General Reno, not with line attorneys like Miguel Estrada.

Take, for example, the first case MALDEF cites as evidence of Estrada's alleged prosecution bias: *Richards v. Wisconsin*, 520 U.S. 385 (1997), where the court considered whether to create an exception to the "knock and announce rule" when police officers execute a search warrant in a felony drug investigation. The first name listed on the Clinton Administration's amicus brief in that case was **Walter Dellinger**, then serving as President Clinton's Acting Solicitor General. The same is true of the second cited case: *Powell v. Nevada*, 511 U.S. 79 (1994), where the Clinton Administration's amicus brief was authorized by Solicitor General **Drew Days**.

MALDEF's treatment of *Richards* is additionally problematic because the group inaccurately describes the Clinton Administration's position in that case. Although the state of Wisconsin was arguing for a categorical, per se exception in felony drug cases, Estrada argued for a much narrower, case-by-case exception, as the following excerpt from the oral argument transcript reveals:

Question: "You are suggesting a general standard, not a per se rule. Is that an appropriate characterization of your brief and of your argument?"

Mr. Estrada: "That is right, Justice Kennedy. All we're saying is that the standard that is offered by [defense counsel] is so low that in the absence of any further information the officer's knowledge that the case involves drug-dealing will itself be a reasonable basis for a case-specific reasonable belief that there is danger to the officers."

Question: “Well, you’re not supporting the Wisconsin rule in any event, the Wisconsin supreme court per se rule.”

Mr. Estrada: “No, we’re not.”

The Supreme Court unanimously adopted the position Estrada articulated on behalf of the Clinton Administration.

### **Defending Congressional Prerogatives**

MALDEF next objects to an amicus brief Estrada filed in *Dickerson v. United States*, 530 U.S. 428 (2000), where Estrada’s client, Maricopa County, Arizona, urged the Supreme Court to defer to a congressional statute that limited the reach of *Miranda v. Arizona*, 384 U.S. 436 (1966). In fact, Estrada has appeared on both sides of *Miranda*-type cases. In *Campaneria v. Reid*, 891 F.2d 1014 (2d Cir. 1989)—Estrada’s first case as a practicing lawyer, and a pro bono matter—Estrada argued that a police interrogation must cease immediately after a suspect unequivocally invokes his constitutional right to remain silent.

Campaneria, who was stabbed, was believed by police to have shot his assailant. After the altercation, Campaneria was treated at a hospital, and police officers read him his *Miranda* warnings. The defendant—who had little understanding of the English language, was being treated in an intensive care unit, and was on medication—replied, “No, I don’t want to talk to you now, maybe come back later.” Although Campaneria had unequivocally invoked his right under *Miranda* to remain silent, the officer continued, “If you want to talk, now is the time to do it.” Campaneria then agreed to talk, and during the subsequent interview made incriminating statements. Estrada, who was working with the Legal Aid Society and the Federal Defender Services Unit in New York City, argued both that his client’s statements were not voluntarily made, and that they had been obtained in violation of *Miranda*.

As the *Campaneria* case makes plain, the arguments Estrada advanced in *Dickerson* on behalf of his client do not reflect any latent hostility to the rights of criminal defendants. Instead, Estrada’s client—the Maricopa County Attorney’s Office—believed that the Supreme Court should defer to an act of Congress, 18 U.S.C. § 3501, that sought to restore the traditional “voluntariness” test for the admissibility of confessions. Under that standard, coerced confessions are unconstitutional, but a voluntary confession need not be excluded simply because of a technical defect in warnings given to a suspect.

Estrada’s central argument in *Dickerson* was that a congressional enactment was entitled to judicial deference, and he urged the Supreme Court to respect Congress’s independent power to interpret the Constitution. Estrada’s argument thus was consistent with the Senate Judiciary Committee’s report accompanying § 3501, which concluded that **“voluntary confessions have been admissible in evidence since the earliest days of the Republic.”** 1968 USCCAN at 2137, 2124. Thus, to the extent that the *Dickerson* brief reveals anything at all about Estrada’s

personal views, it shows only that he has a healthy respect for the power of Congress to enact laws designed to address pressing social problems.

More fundamentally, the arguments a lawyer makes on behalf of a client are not evidence of his or her personal views. Rule 1.2(b) of the ABA's Model Rules of Professional Conduct makes clear that **"[a] lawyer's representation of a client . . . does not constitute an endorsement of the client's political, economic, social, or moral views or activities."** Lawyers have an ethical obligation to make all reasonable arguments that will advance their clients' interests. According to Rule 3.1, **a lawyer may make any argument if "there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law."** Lawyers would violate their ethical duties to their clients if they only made arguments with which they would agree if they were a judge.

If confirmed, Estrada would apply the Supreme Court's decision in *Miranda*, just as he would do with all other binding precedents. History is full of examples where a lawyer who loses a case faithfully applies that precedent after being elevated to the bench. In a companion case to *Miranda*, U.S. Solicitor General Thurgood Marshall argued that police officers should not be required to give warnings before questioning crime suspects. **"An inflexible constitutional rule turning on . . . the recitation or omission of a warning may be easier to apply, but we believe that it will, more often than not, cast out the baby with the bath."** Brief of the United States at 38. Yet as a Justice on the Supreme Court, Justice Marshall had no difficulty applying *Miranda* and its progeny, referring to *Miranda* as a "historic precedent." *Duckworth v. Eagan*, 492 U.S. 195 (1989) (Marshall, J., dissenting).

### **A Commitment to Eradicating Racial Discrimination**

As a lawyer who has himself overcome significant obstacles, Estrada has shown an awareness of the continuing problem of racial discrimination, and a commitment to eradicating it. For example, Mary Jo White, President Clinton's U.S. Attorney for the Southern District of New York, invited Estrada to join a working group that she tasked with finding ways to increase the number of Assistant U.S. Attorneys from minority groups. Estrada gladly accepted this invitation and has made important contributions to the group's efforts to enhance minority hiring in that office. As one of only four Hispanics ever hired to clerk for the Supreme Court, Estrada is profoundly aware of the lack of minorities in the upper echelons of the judiciary. He now seeks to become the first Hispanic ever to sit on the D.C. Circuit.

MALDEF's cited 1998 *USA Today* article about how Supreme Court Justices rarely hire minority clerks has been badly distorted. Estrada was quoted as stating that the statistical underrepresentation does not mean that the Justices are deliberately discriminating against minority applicants: "if there was some reason for underrepresentation, it would be something to look into, but I don't have any reason to think it's anything other than a reflection of trends in society." In other words, Supreme Court Justices hire their clerks from a narrow pool of applicants: those who have graduated at the top of their classes from the nation's top law schools, and who have gone on to clerk for well-regarded lower-court judges. For a variety of

reasons, this pool has not often included a large number of minorities. According to Estrada, these “trends in society,” not invidious discrimination on the part of the Justices, explained why there were relatively few minority Supreme Court clerks.

### **Fairness to All, Rich and Poor Alike**

Both in government service and private practice, Estrada has sought to ensure that all citizens—regardless of their economic, social or ethnic background—receive the law’s fullest protections and benefits. Because of his commitment to upholding the law, he has garnered strong bipartisan support from those who are familiar with his record. These individuals are certain that Estrada would guarantee everyone who came before him a fair trial. The **Chief of Staff to former Vice President Al Gore** wrote to the Senate Judiciary Committee that: “Miguel will rule justly toward all, without showing favor to any group or individual. . . . The challenges he has overcome in his life have made him genuinely compassionate, genuinely concerned for others, and genuinely devoted to helping those in need. . . . Those without means or without advantage will get a fair hearing from Miguel Estrada.”

Although Estrada has represented corporations in some cases, this in no way implies that as a judge he would give them an unfair advantage in court—any more than the fact that he represented a death row inmate means that he would give an advantage to convicted murderers. As discussed above, ethics rules make plain that an attorney’s representation of a particular client does not mean that the attorney endorses the client’s views or actions. As a well-respected appellate lawyer, it has been Estrada’s professional duty to represent his clients to the best of his ability. It would be inaccurate and unfair to characterize any position he has taken on behalf of a client as indicative of how he would rule as a judge.

The Senate has followed this understanding when examining the records of recent nominees now serving on Circuit Courts. For example, Roger Gregory, originally nominated by President Clinton to the 4th Circuit, once represented General Motors against sex-discrimination and pay-disparity claims under Title VII. And Clinton appointee Sandra Lynch of the 1st Circuit represented General Electric in a race-discrimination claim by an African-American employee who alleged that he was passed over for promotions in favor of white employees. Both were confirmed with relatively little to-do, and MALDEF never saw fit to oppose their nominations.

### **Confirm Estrada Now!**

Not much can be said about Miguel Estrada’s superlative qualifications that hasn’t already been discussed. The recipient of the American Bar Association’s highest possible rating—a unanimous “well qualified”—Estrada is an American success story. But regrettably, MALDEF and a few other groups have chosen to overlook Estrada’s stellar legal career and oppose him—not because they believe he lacks the necessary skills, not because they doubt his fairness and integrity, but because he may not share their political outlook. Now, when American Latinos are on the verge of another milestone in our long struggle for equality and prosperity—one of our own on the second highest court in the land—some in the Hispanic

Establishment have sold out the aspirations of our people, trading it for a bit of momentary influence with the power brokers in Washington, DC. We urge the Senate to ignore this cynical ploy, and confirm Miguel Estrada to the D.C. Circuit speedily.